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No. 84-1097

In the Supreme Court of the United States

OCTOBER TERM, 1984

S. SIMCHA GOLDMAN, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Free Exercise Clause of the First Amendment requires the Air Force to create an exception to otherwise applicable uniform regulations so that an Orthodox Jewish officer may wear a skullcap (or yarmulke) while on active duty.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 734 F.2d 1531. The opinions on denial of rehearing en banc (Pet. App. 23a-27a) are reported at 739 F.2d 657. The opinion of the district court (Pet. App. 28a-34a) is unreported. The opinion of the district court on preliminary injunction is reported at 530 F. Supp. 12.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1984, and a petition for rehearing was denied on August 10, 1984 (Pet. App. 21a-27a). On November 1, 1984, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 10, 1984. On December 3, 1984, the Chief Justice again extended the time, to and including January 7, 1985, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner S. Simcha Goldman, formerly a captain in the United States Air Force, is a member of the Orthodox Jewish faith and an ordained rabbi. In keeping with the practice and tradition of his religion, petitioner wears a head covering, usually a skullcap (or yarmulke), during waking hours. During the period at issue here, petitioner was on active duty at March Air Force Base in Riverside, California, serving as a clinical psychologist. Air Force Regulation 35-10, which prescribes the official Air Force uniform, provides that "Air Force members will wear the Air Force Uniform while performing their military duties" and that (with exceptions for armed security police and persons participating in certain religious services) "[h]eadgear will not be worn * * * [w]hile indoors" (A.F.R. 35-10, § 1-6; Pet. App. 4a-8a).

For several years, petitioner wore his yarmulke while on duty indoors, notwithstanding the uniform regulations, and no objection was raised by his superiors (Pet. App. 28a). In May 1981, however, petitioner's commander was informed of his uniform violation, and he was ordered to cease wearing the yarmulke with his uniform at all places on the Air Force Base outside the hospital where he worked (*id.* at 29a). Petitioner objected to this requirement, and requested permission to wear a yarmulke at all times and at all places while in uniform. On June 23, 1981, the hospital commander ordered petitioner to cease wearing his yarmulke anywhere while in uniform on the Base, including the hospital. When petitioner continued to wear his yarmulke, the commander issued him a letter of reprimand. *Ibid.* The commander also withdrew a recommendation that petitioner's application to extend the term of his active service be approved, and substituted a negative recommendation (Pet. App. 4a). Petitioner later voluntarily withdrew his

application to extend the term of his active service, and he is now on inactive reserve.[1]

2. Petitioner filed suit in the United States District Court for the District of Columbia, challenging this application of AFR 35-10 on First Amendment grounds and seeking damages and injunctive relief. The district court granted petitioner's motion for a temporary restraining order and later for a preliminary injunction to prohibit the Air Force from enforcing AFR 35-10 to prevent him from wearing a yarmulke while in uniform during the pendency of this litigation.

After trial, the district court found that making religious exceptions to the uniform regulations "may enhance the effectiveness of the Air Force by dissipating hostility over minor matters and thus contribute to a perception of the Air Force as a less rigid, more humane institution" (Pet. App. 31a). The court rejected the Air Force's position that uniform apparel regulations are necessary for providing "teamwork, motivation, discipline, esprit de corps and image" because "[t]his position was not established by clinical or other studies of the effect on a combat-ready fighting force" (*ibid.*).[2] The court held that enforcement of A.F.R. 35-10 in these circumstances violated petitioner's right to the free exercise of religion (Pet. App. 34a) and enjoined respondents from applying the regulation to petitioner "insofar as it relates to his wearing a yarmulke for religious reasons" (*id.* at 35a).

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[1]In a separate lawsuit, petitioner is challenging the denial of his application for active duty reserve status. That denial is not at issue here.

[2]The district court stated (Pet. App. 33a) that "[h]ad the decision to exclude a *bona fide* religious exception for yarmulkes from A.F.R. 35-10 been the product of an empirical study, psychological survey, or the like, it would be supportable."

The court of appeals vacated and remanded (Pet. App. 1a-20a). The court concluded (*id.* at 12a) that petitioner had a legitimate free exercise interest in wearing a yarmulke with his uniform but that the Air Force's rationale that "strict enforcement of its regulations is necessary for military purposes" is "entitled to deference because it is within its expertise and outside ours" (*id.* at 19a-20a). After reviewing applicable precedents of this Court, the court of appeals held (*id.* at 11a) that its function was not to undertake a " 'balancing' of the individual and military interests on each side," but to determine "whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree." Although petitioner "raises serious questions concerning the restrictiveness of the Air Force's regulations and the manner of their enforcement," the court concluded that "the Air Force's reason for its rules, particularly in view of their specialized military nature, are sufficient answer" (*id.* at 20a).[3]

ARGUMENT

1. In *Kelley* v. *Johnson*, 425 U.S. 238 (1976), this Court recognized the strength of the governmental interest in enforcing uniform dress and grooming regulations in the police force. One of those interests was to promote "the esprit de corps which such similarity [in appearance] is felt to inculcate within the police force itself" (*id.* at 248). These considerations are no less powerful in the military.[4]

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[3]The court of appeals remanded the case to the district court for a determination whether, "in light of the difficulty of the issue and the good faith of the parties, equity requires that [petitioner's] military record be expunged of any negative materials related to the issues in this case" (Pet. App. 20a).

[4]Indeed, the argument in *Kelley* presupposed that uniform regulations would be valid in the military context; the lower court's reasoning in striking down the police regulation was that the " 'unique judicial deference' accorded by the judiciary to regulation of members of the military was inapplicable" to the police (425 U.S. at 246).

Uniform requirements of military dress and appearance have long been considered a key instrument in the welding of disparate individuals into a united and disciplined fighting team. Major General William P. Usher, the Director of Personnel Plans at Air Force Headquarters, testified in district court (Pet. App. 30a) that "[u]niformity of dress, except for distinctions of rank, promotes the teamwork necessary for effective completion of the mission," that "[d]iscipline of enlisted personnel would be undermined" if departures from uniform regulations were permitted, and that "[u]niform standards of dress engender pride and thus further the mission of the Air Force." As this case illustrates, however, uniformity of dress also entails restriction of individual choice, whether stemming from religious, ethnic, or cultural traditions or simply from personal taste.

One need not be unsympathetic to petitioner's situation to appreciate the difficulty of the problem facing the military. Many religious adherents may raise claims to exceptions from uniform regulations;[5] the military is in no position to make judgments regarding the relative strength or sincerity of these claims; the greater the number of exceptions to the uniform regulations, the less effective the regulations will be in achieving their ends of unity, morale, and discipline; the enforcement of uniform regulations is necessarily highly decentralized and requires simple, bright-line rules; the existence of grounds on which to challenge uniform requirements will necessarily foster challenges to authority; to permit some exceptions (on religious grounds) may undermine the willingness to conform of others who object to uniform requirements for other reasons (*e.g.*, free speech or ethnic tradition). The Air Force has adopted, for

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[5]Evidence at trial showed that for many religions, a variety of different garments, body markings, or hair styles have religious significance (C.A. App. 272-284).

the present, a simple, neutral solution: it permits no visible deviations from the uniform regulations for active duty personnel. We submit that, in the military context, this solution is constitutionally acceptable.

Not even the district court found that petitioner has a substantive right to a religious exception to the uniform regulations, which may not be infringed by the Air Force. Rather, the basis for the district court's judgment in favor of peititioner was that the Air Force uniform regulations are insufficiently supported by "clinical or other studies" (Pet. App. 31a). The court expressly stated that "[h]ad the decision to exclude a *bona fide* religious exception for yarmulkes * * * been the product of an empirical study, psychological survey or the like, it would be supportable" (*id.* at 33a). On this basis, the district court enjoined the Air Force from applying that regulation to petitioner "insofar as it relates to his wearing a yarmulke for religious reasons" (*id.* at 35a). This holding is in error for two fundamental reasons.

First, the military is not required to conduct clinical studies before it may enforce regulations of this sort. The district court observed that the regulations are "based upon the experience of the Air Force in times of peace and in times of war" (Pet. App. 31a) and that "respect" must be given General Usher's testimony explaining the military reasons for the regulations (*id.* at 33a). The court held, however, that conclusions "based * * * on the personal beliefs and assumptions of Air Force officials" — even those with "expertise" in the area — "are inadequate to withstand constitutional scrutiny" (*ibid.*).

This analysis is wholly unprecedented. It is not the role of the courts to second-guess decisions of an admittedly military character merely because they are based on practical "experience" rather than "empirical stud[ies]." " 'The

complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments.' " *Chappell* v. *Wallace,* No. 82-167 (June 13, 1983), slip op. 6, quoting *Gilligan* v. *Morgan,* 413 U.S. 1, 10 (1973). Cf. *Parker* v. *Levy,* 417 U.S. 733, 763 (1974) (Blackmun, J., concurring) ("The subtle airs that govern the command relationship are not always capable of specification."). As the court of appeals observed, "the Air Force's judgment on this issue is entitled to deference because it is within its expertise and outside ours" (Pet. App. 19a-20a).

Second, the district court's decision was made in a vacuum, in the context of a single sympathetic case. The Air Force, in contrast, has an obligation to establish and enforce rules on a consistent and nonarbitrary basis. It cannot, without adequate rationale, permit airmen of one religious persuasion to disregard uniform regulations while requiring airmen of other faiths to obey. As discussed more fully below, at congressional direction the Department of Defense is undertaking a coordinated study to make recommendations about how the military might better accommodate religious practices. To make exceptions on a case-by-case basis both disregards the legitimate interest of the military in uniformity and results in disparate treatment among servicemen of different creeds.

This point is addressed most directly in *United States* v. *Lee,* 455 U.S. 252, 259-260 (1982). There, a member of a small religious group — the Old Order Amish — sought an exemption from the social security tax on employers on free exercise grounds. This Court recognized that such a claim cannot be analyzed on the basis of the particular claimant, or his religious group, alone. Rather, the question is whether the government's interest could be upheld in the face of "myriad exceptions flowing from a wide variety of religious beliefs" (*id.* at 260). Similarly, the feasibility of an

exemption from military dress and grooming regulations must be judged in light of the "myriad exceptions" to those regulations that would be sought. The district court made no attempt to show how its yarmulke exception would fit into the overall scheme of military dress and grooming.

The court of appeals' reversal of the district court decision is simply an application of established constitutional doctrine to the difficult facts of this case. The court held that the proper standard is "whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree" (Pet. App. 11a, relying on *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), and *United States* v. *Robel*, 389 U.S. 258 (1967)). The court then analyzed the Air Force's rationale for its uniform regulation in considerable detail (Pet. App. 16a-20a), and concluded that "the peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible" (*id.* at 19a).

Petitioner apparently does not disagree with the legal standard applied by the court of appeals and quoted above. Instead, he challenges, as a factual matter, the strength of the justification for the Air Force rule. Petitioner contends that the action of the Air Force was an "unreasoned prohibition" (Pet. 6), that petitioner's disobedience to the regulations "had caused not the slightest disruption of performance or morale during the previous three-and-one-half years" (*id.* at 6-7), and that "there is no rational basis for the Air Force's restriction other than enforcement 'for the sake of enforcement' " (*id.* at 7). This disagreement with the court of appeals over the importance of the the Air Force regulations raises no significant question of law warranting review by this Court. Moreover, petitioner's assertions simply ignore the court of appeals' careful conclusions regarding the connection between uniform regulations and

morale and discipline.[6] Petitioner's argument is precisely the same as that rejected by this Court in the police context in *Kelley* v. *Johnson*, 425 U.S. at 243 (police grooming regulations said to have no purpose other than " '[u]niformity for uniformity's sake' "); the argument is no more meritorious here than it was in *Kelley*.

2. Petitioner does not contend that the decision below conflicts with any decision of this Court or of another court of appeals. Rather, petitioner asserts (Pet. 5) that the court of appeals' ruling conflicts with "this Court's consistent articulation of the constitutional standards for governmental restrictions on religiously motivated observances," citing *Thomas* v. *Review Board*, 450 U.S. 707 (1981), *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963). However, those decisions are readily distinguishable.

First, in none of those decisions was there a significant governmental interest in uniformity of application. Cf. *United States* v. *Lee*, 455 U.S. at 258-259 ("the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high"); *Braunfeld* v. *Brown*, 366 U.S. 599, 608-609

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[6]Petitioner relies heavily (Pet. 4, 5, 6, 7) on the court of appeals' statements that the Air Force regulations are "necessarily arbitrary" and that the Air Force's interest "lies in the enforcement of regulations * * * for the sake of enforcement" (Pet. App. 19a). However, these statements have been repeated out of their context. The court of appeals did not view the Air Force uniform regulations as "arbitrary" in the sense of having no reason or purpose. Rather, the court observed that the regulations are "arbitrary" in the sense that "[i]t is impossible to argue * * * that a decorative hat of one shape or one color is demonstrably superior to another" (*ibid.*). Nonetheless, as the court recognized and petitioner does not, "enforcement of rules that certain hats may be worn only by certain people or at certain times serves the military purposes of identification and indoctrination into instinctive obedience" (*ibid.*).

(1961) (rejecting claim for religious exemption from state law setting aside a uniform day of rest). As the court of appeals recognized (Pet. App. 19a), the interests of the states in *Yoder, Thomas,* and *Sherbert* in enforcing their rules "would not be greatly impaired by making exceptions when enforcement would not serve the purpose underlying the rules." By contrast, military uniforms must — as their name suggests — be uniform; nonuniformity would defeat the very purpose.

Second, the decisions relied upon by petitioner do not involve the military.[7] This Court has long recognized that "the different character of the military community and the military mission requires a different application of [First Amendment] protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be impermissible outside it." *Parker* v. *Levy,* 417 U.S. 733, 758 (1974). See also *Brown* v. *Glines,* 444 U.S. 348 (1980); *Middendorf* v. *Henry,* 425 U.S. 25 (1976); *Greer* v. *Spock,* 424 U.S. 828 (1976); *Orloff* v. *Willoughby,* 345 U.S. 83, 93-94 (1953); *Katcoff* v. *Marsh,* No. 84-6184 (2d Cir. Jan. 22, 1985), slip op. 1468-1469.

A uniform dress regulation of this sort would presumably not survive constitutional scrutiny outside the military, police, or analogous contexts, and would be subject to challenge in the private sector under Title VII of the Civil Rights Act of 1964. See 42 U.S.C. 2000e(j), 2(a)(1). In the military, however, the right to select one's manner of dress, like the right to circulate petitions or to engage in disruptive

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[7] *Brown* v. *Glines,* 444 U.S. 348 (1980), and *Chappell* v. *Wallace, supra,* also cited by petitioner (Pet. 6), obviously create no conflict with the decision below; in both cases this Court rejected constitutional challenges to military decisions.

expression, is circumscribed by the legitimate requirements of military discipline and order. "The rights of military men must yield somewhat 'to meet certain overriding demands of discipline and duty.' " *Brown* v. *Glines,* 444 U.S. at 354, quoting *Parker* v. *Levy,* 417 U.S. at 744 (citation omitted). Petitioner's argument simply fails to take into consideration the inherent distinctions between civilian and military life.

3. Aside from the legal merits, there are additional reasons why review of the decision below is unwarranted. First, although this case is not technically moot,[8] a reversal of the decision below would have no immediate practical effect on petitioner. Since he is currently on inactive reserve status, he is not required to comply with Air Force uniform regulations. Only if he were to return to active duty (or active reserve status) in the future would the issue arise.

Moreover, it is possible that by the time (if any) that petitioner returns to uniformed duty, the regulations at issue here may have been amended. On October 19, 1984, after the court of appeals denied petitioner's request for rehearing, Congress passed legislation requiring the Secretary of Defense to establish a study group "to examine ways to minimize the potential conflict between the interests of members of the Armed Forces in abiding by their religious tenets and the military interest in maintaining discipline." Department of Defense Authorization Act, Pub. L. No. 98-525, § 554, 98 Stat. 2532. The legislation directs the Secretary, within 20 days of receipt of the report, to issue "appropriate implementing policy."

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[8]In light of the possibility that petitioner's application to be placed on active duty reserve status (which would entail occasional uniformed duty) might be accepted, as well as the possibility (albeit slight) that he would be called up for active duty in an emergency, it cannot be said that this case is entirely without continuing significance.

Pursuant to this legislation, the Secretary has formed a study group and has invited comments from the interested public. 49 Fed. Reg. 48596 (Dec. 13, 1984). The group has been directed to "address the issues of compliance with and modifications of uniform regulations, dietary restrictions, sabbath observance, and facial and body hair length practices," and to "consider the views of a broad spectrum of religious organizations and specialists outside the government." *Ibid.* The report of the study group is expected to be completed by mid-April 1985.

This decisionmaking process initiated by Congress and conducted by the Executive branch under congressional oversight offers the greatest promise for achieving a fair and consistent, yet militarily feasible and justifiable, policy toward religious accommodation in the armed forces. Unlike parties in litigation in district court, the Department of Defense study group will be able to consider the problems of all religious groups significantly represented in the armed forces and will have access to the opinions and ideas of chaplains, religious groups, military leaders and personnel managers, and others with the experience necessary to devise solutions to these sensitive and difficult problems. Particularly in light of this expected report and the action that may be taken upon it, there is no need for review of the court of appeals' decision. The regulations at issue here may be modified without the need for constitutional adjudication; alternatively, if they are retained in substantially the same form, their basis and purpose will have been substantially clarified and the reasons for rejecting alternatives articulated.

We would observe, moreover, that accommodation of religious practices by the political branches, rather than by judicial injunction, is the constitutionally preferred course.

Although in certain unusual circumstances cited by petitioner (*Thomas* v. *Review Board, supra; Wisconsin* v. *Yoder, supra; Sherbert* v. *Verner, supra*), this Court has found that particularized departures from facially neutral laws and regulations are required under the Free Exercise Clause as accommodations to religious practice, it is far more common for the political branches of government to determine the balance — within the limits set by the Free Exercise Clause and the Establishment Clause — between the public's need for uniform application of the law and the occasional need of individuals for specific accommodation of their religious practices. See Gov't Br. for the Sec'y of Labor in *Tony and Susan Alamo Foundation* v. *Donovan*, No. 83-1935, at 40-42;[9] *United States* v. *Lee, supra; Gillette* v. *United States*, 401 U.S. 437 (1971); *Zorach* v. *Clauson*, 343 U.S. 306, 313-314 (1952). Judicial deference to the accommodations reached by Congress and the Executive branch is particularly appropriate here, where the question is the constitutionality of the "Rules for the Government and Regulation of the land and naval Forces" — a subject expressly within the congressional authority under Article I, Section 8, Clause 14 of the Constitution. See *Rostker* v. *Goldberg*, 453 U.S. at 64-65.

In this instance, the court of appeals properly declined to intervene in a matter peculiarly within the expertise of the military; and Congress and the Secretary of Defense have responded, in a spirit of toleration and accommodation, to initiate a process to determine what changes in military practice, if any, might be appropriate. This is as it should be. See *Chappell* v. *Wallace*, slip op. 6, quoting *Gilligan* v. *Morgan*, 413 U.S. at 10 (emphasis in original) (military judgments are "subject *always* to civilian control of the Legislative and Executive Branches").

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[9]We have provided a copy of our brief in *Alamo Foundation* to counsel for petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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